BRB No. 13-0116 BLA

ARNOLD R. STREET	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	DATE ISSUED: 11/27/2013
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (10-BLA-5225) of Administrative Law Judge Linda S. Chapman (the administrative law judge) awarding benefits on a subsequent claim[1] filed on February 23, 2009, pursuant to the Black Lung

[1] Claimant filed three previous claims on September 17, 1993, October 25, 1996, and May 8, 2003. Director's Exhibits 1-3. Each of these claims was finally denied because claimant did not establish the existence of pneumoconiosis. *Id.*

Benefits Act, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).[2] When this case was most recently before the Board, it affirmed the administrative law judge's finding that claimant had at least twenty years of underground coal mine employment. The Board also affirmed her finding that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309, because new evidence established that claimant had clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2013). The Board held, however, that, because the administrative law judge failed to properly evaluate the medical opinion evidence, she erred in finding that it established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv)(2013) and, consequently, erred in finding that total respiratory disability was established pursuant to 20 C.F.R. §718.204(b)(2013) overall.[3] The Board further held that the administrative law judge erred in finding that claimant was entitled to invocation of the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4). Regarding rebuttal of the amended Section 411(c)(4) presumption, the Board held that the administrative law judge erred in finding that employer failed to establish that claimant's

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that claimant's disability is due to pneumoconiosis if claimant establishes that he suffers from a totally disabling respiratory or pulmonary impairment and worked at least fifteen years in underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), *amended by* Pub L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013)(to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

[3] The Board affirmed, as unchallenged on appeal, the administrative law judge's findings that the arterial blood gas study evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(ii)(2013); but that the pulmonary function study evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)(2013). *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983). The Board also held that claimant is precluded from establishing total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iii)(2013), because there was no evidence of cor pulmonale with right-sided congestive heart failure in the record.

totally disabling respiratory impairment was not due to pneumoconiosis.[4] The Board, therefore, vacated the administrative law judge's award of benefits and remanded the case to the administrative law judge to reconsider the relevant medical evidence pursuant to Section 718.204(b)(2)(2013), and subsection 718.204(b)(2)(iv)(2013) and pursuant to 30 U.S.C. §921(c)(4). *See Street v. Dominion Coal Co*., BRB No. 11-0372 BLA (Feb. 14, 2012) (unpub.). Specifically, the Board instructed the administrative law judge to reconsider whether the opinions of Drs. Hippensteel and Rasmussen established the existence of a totally disabling pulmonary or respiratory impairment pursuant to Section 718.204(b)(2)(iv)(2013) and to then weigh together all the evidence relevant to the existence of total respiratory disability pursuant to Section 718.204(b)(2013), to determine whether total respiratory disability was established overall. Regarding whether employer rebutted the amended Section 411(c)(4) presumption, the Board instructed the administrative law judge to reconsider the opinion of Dr. Hippensteel.

On remand, the administrative law judge found that the medical opinion evidence established total respiratory disability pursuant to Section 718.204(b)(2)(iv)(2013) and that total respiratory disability was established pursuant to Section 718.204(b)(2013) overall. Consequently, she found that, because claimant established a totally disabling respiratory impairment and had at least twenty years of underground coal mine employment, he was entitled to invocation of the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis.[5] Regarding rebuttal of the amended Section 411(c)(4) presumption, she found that employer failed to carry its burden of establishing that claimant's totally disabling respiratory impairment was not due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge: erred in finding that the medical opinion evidence established total respiratory disability pursuant to Section 718.204(b)(2)(iv)(2013); erred in finding that total respiratory disability was established pursuant to Section 718.204(b)(2013) overall; erred in finding that claimant was entitled

[4] The Board affirmed, as unchallenged on appeal, the administrative law judge's finding that, because claimant has clinical pneumoconiosis, employer could not rebut the amended Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. *Skrack*, 6 BLR at 1-711.

[5] The administrative law judge's Decision and Order on Remand was issued on November 14, 2012. On November 20, 2012, the administrative law judge issued an errata deleting language from page 6 of her November 14, 2012 decision because it indicated that claimant was required to establish disability causation pursuant to 20 C.F.R. §718.204(c)(1)(2013). The administrative law judge stated, however, that pursuant to the amended Section 411(c)(4) presumption, claimant is not required to establish disability causation to be eligible for benefits.

to invocation of the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis; and erred in finding that employer failed to rebut the presumption. Claimant has not responded. The Director, Office of Workers' Compensation Programs (the Director), has responded, urging the Board to reject employer's arguments and affirm the administrative law judge's Decision and Order on Remand awarding benefits. In reply to the Director's brief, employer reiterates its arguments.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 411(c)(4) Invocation
20 C.F.R. §718.204(b) – Total Respiratory Disability

In finding that the medical opinion evidence established total respiratory disability pursuant to Section 718.204(b)(2)(iv)(2013), the administrative law judge credited the opinion of Dr. Rasmussen[7] over the opinion of Dr. Hippensteel.[8] Specifically, she noted

[6] The record indicates that claimant's coal mine employment was in Virginia. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Director's Exhibit 6; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[7] Dr. Rasmussen examined claimant on April 21, 2009, and conducted an x-ray and clinical testing on that date. Based on the examination, symptomology, work and medical history, x-ray, pulmonary function study, diffusion capacity testing, and blood gas study, Dr. Rasmussen found that claimant has clinical pneumoconiosis. Dr. Rasmussen also found that claimant has legal pneumoconiosis *i.e.*, chronic obstructive pulmonary disease/emphysema due, in part, to coal mine employment. Dr. Rasmussen further found that claimant is totally disabled from his usual coal mine employment and that his pneumoconiosis is a cause of his disability. Although Dr. Rasmussen opined that claimant's pulmonary function study showed a minimal obstructive ventilatory impairment, he opined that claimant's diffusion capacity testing and arterial blood gas study results revealed a severe totally disabling respiratory insufficiency, as evidenced by a reduction in diffusing capacity and a marked impairment in oxygen transfer and hypoxemia during light exercise. Director's Exhibit 20.

[8] Dr. Hippensteel examined claimant on August 4, 2009 and conducted an x-ray and clinical testing on that date. Based on examination, symptomology, work and medical history, x-ray, pulmonary function study, and blood gas study, Dr. Hippensteel found that claimant has coal workers' pneumoconiosis. He stated that, from "an intrinsic

that Dr. Rasmussen's opinion that claimant "did not retain the respiratory capacity to perform his regular coal mine employment," as supported by claimant's "arterial blood gas study results [that] reflected a severe and totally disabling respiratory impairment," was sufficient to establish total respiratory disability. Decision and Order on Remand at 3. She rejected the opinion of Dr. Hippensteel, "that from an intrinsic pulmonary function standpoint, [claimant] had the respiratory capacity to return to his previous coal mine employment," because the doctor also found that claimant had disabling hypoxemia, albeit due to obesity, sleep apnea, pulmonary embolism, chronic narcotic use, cardiac deconditioning, and hypertensive cardiovascular disease. *Id.* In rejecting Dr. Hippensteel's opinion that claimant's disabling hypoxemia could be due to obesity, sleep apnea, pulmonary embolism, chronic narcotic use, cardiac deconditioning and hypertensive cardiovascular disease, the administrative law judge found that it was speculative. The administrative law judge, therefore, found that total respiratory disability was established pursuant to Section 718.204(b)(2)(iv)(2013), based on Dr. Rasmussen's opinion. Next, considering the non-qualifying pulmonary function study evidence, the qualifying blood gas study evidence[9] and the medical opinion evidence together, she found that total respiratory disability was established pursuant to Section 718.204(b)(2013) overall, and, therefore, found that claimant was entitled to invocation of the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis.

Employer contends, however, that the administrative law judge erred in rejecting, as speculative, Dr. Hippensteel's opinion that claimant's disabling hypoxemia could be caused by obesity, sleep apnea, chronic narcotic use, pulmonary embolism, cardiac deconditioning and hypertensive cardiovascular disease, as Dr. Hippensteel explained the reasons for his diagnosis. In response, the Director contends that the administrative law judge properly rejected Dr. Hippensteel's opinion because the cause of any totally

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pulmonary function standpoint," claimant has the respiratory capacity to perform his usual coal mine employment as a shuttle car operator, but stated that claimant is "disabled as a whole man from going back to his job in the mines because of his other medical problems unrelated to coal workers' pneumoconiosis." Director's Exhibit 21. Dr. Hippensteel also stated, however, that claimant suffers from disabling hypoxemia shown by a gas exchange impairment caused by the effects of obstructive sleep apnea, obesity, cardiac deconditioning, impaired cardiac performance with exercise, a pulmonary embolism, and chronic narcotic therapy. Director's Exhibit 21.

[9] The pulmonary function study and blood gas study evidence the administrative law judge relied on consists of a non-qualifying pulmonary function study and a qualifying blood gas study conducted by Dr. Rasmussen on April 21, 2009 and a non-qualifying pulmonary function study and qualifying blood gas study conducted by Dr. Hippensteel on August 4, 2009.

disabling respiratory impairment claimant has is irrelevant in determining the existence of the total respiratory disability.

We agree with the Director. In finding that claimant suffers from total respiratory disability pursuant to Section 718.204(b)(2)(iv)(2013), the administrative law judge credited the opinion of Dr. Rasmussen, which she found to be supported by the qualifying blood gas study evidence. Employer has not challenged the administrative law judge's finding that Dr. Rasmussen's opinion supports a finding of total respiratory disability. Rather, employer contends that the administrative law judge should have credited Dr. Hippensteel's opinion attributing claimant's disabling hypoxemia to his obesity, sleep apnea, pulmonary embolism, chronic narcotic use, cardiac deconditioning and hypertensive cardiovascular disease. As the Director contends, however, the opinion of Dr. Hippensteel, acknowledging that claimant has disabling hypoxemia, albeit not due to pneumoconiosis, does not show that claimant does not have a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv).

Employer has not challenged the administrative law judge's finding that Dr. Rasmussen's opinion is sufficient to support a finding of total respiratory disability and Dr. Hippensteel's opinion, that pneumoconiosis is not the cause of claimant's disabling hypoxemia, is insufficient to show that claimant does not have a total respiratory disability. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence supports a finding of total respiratory disability pursuant to Section 718.204(b)(2)(iv)(2013).

Further, contrary to employer's argument, the administrative law judge was not required to accord greater weight to the non-qualifying pulmonary function study evidence and the opinion of Dr. Hippensteel than to the opinion of Dr. Rasmussen and the qualifying blood gas study evidence. Rather, the administrative law judge properly considered together the non-qualifying pulmonary function study evidence, the qualifying blood gas study evidence, and the medical opinion evidence to find that total respiratory disability was established pursuant to Section 718.204(b)(2013) overall. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(en banc). Accordingly, we affirm the administrative law judge's finding that total respiratory disability was established pursuant to Section 718.204(b)(2013) overall.[10]

In addition, because the administrative law judge's found that claimant has a total respiratory disability and at least twenty years of underground coal mine employment, we

[10] As the Director contends, the non-qualifying pulmonary function studies do not undermine the qualifying blood gas studies as pulmonary function studies and blood gas studies measure different lung functions. *Whitaker v. Director, OWCP*, 6 BLR 1-983, 1-987 (1984); *Sheranko v. Jones and Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984).

affirm the administrative law judge's finding that claimant was entitled to invocation of the amended Section 411(c)(4) presumption.

Section 411(c)(4) Rebuttal
Cause of Total Respiratory Disability

In finding that employer failed to rebut the amended Section 411(c)(4) presumption by showing that claimant's totally disabling respiratory impairment was not due to pneumoconiosis, the administrative law judge noted that Dr. Hippensteel was the only physician who addressed the cause of claimant's total respiratory disability. The administrative law judge, however, rejected Dr. Hippensteel's opinion as speculative, noting that claimant's disabling hypoxemia could be caused by claimant's obesity, sleep apnea, pulmonary embolism, chronic narcotic use, cardiac deconditioning, and hypertensive cardiovascular disease.

Employer contends, however, that Dr. Hippensteel's opinion is not speculative as he explained how the "combined effect of claimant's sleep apnea, aggravated by his obesity and cardiac deconditioning on exercise, as well as claimant's chronic narcotic use explained claimant's blood gas abnormality." Employer's Brief at 22. In response, the Director contends that the administrative law judge properly rejected Dr. Hippensteel's opinion, that claimant's disabling hypoxemia was not related to pneumoconiosis, because Dr. Hippensteel relied, in part, on his finding that claimant's pulmonary function study results showed significant reversibility after the administration of bronchodilators, when a "fixed and irreversible impairment [was] expected from coal workers' pneumoconiosis." Director's Exhibit 21 at 8; Director's Brief at 3.

We agree with the Director. The administrative law judge could properly reject Dr. Hippensteel's opinion, that claimant's disabling respiratory impairment was not related to pneumoconiosis, because the doctor relied, in part, on the reversibility of pulmonary function study results after the administration of bronchodilators. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008). Further, the administrative law judge properly found that Dr. Hippensteel's causation opinion was flawed because he did not explain why claimant's twenty-year history of underground coal mine employment was not a contributing cause of his total respiratory disability. Decision and Order on Remand at 5; *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). Consequently, we affirm the administrative law judge's finding that employer failed to establish that claimant's disabling respiratory impairment was due to pneumoconiosis. 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge